


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10 IN THE SUPERIOR COURT FOR THE
11 COUNTY OF SANTA CLARA

12 SAN JOSE POLICE OFFICERS
ASSOCIATION,

13 Plaintiff,

14 v.

15 CITY OF SAN JOSE, BOARD OF
16 ADMINISTRATION FOR POLICE AND
FIRE RETIREMENT PLAN OF CITY OF
17 SAN JOSE, and DOES 1-10 inclusive,

18 Defendants.

19 AND RELATED CROSS-COMPLAINT
20 AND CONSOLIDATED ACTIONS
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Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928,
112CV226570, 112CV226574, 112CV227864]

**TRIAL BRIEF OF DEFENDANT/CROSS-
PLAINTIFF CITY OF SAN JOSE AND
DEFENDANT DEBRA FIGONE, IN HER
OFFICIAL CAPACITY**

Date of Pretrial Conference: July 12, 2013

Time: 9:00 a.m.

Dept.: 2

Judge: Hon. Patricia M. Lucas

Complaint Filed: June 6, 2012

Trial Date: July 22, 2013

BY FAX

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1 **I. INTRODUCTION**

2 This trial brief outlines the anticipated evidence and law at issue in the upcoming bench
3 trial challenging the Sustainable Retirement Benefits and Compensation Act, adopted by 70% of
4 the City's voters as "Measure B" in the June 2012 election.¹

5 The voters' stated objective in Measure B is for the City to provide Essential City Services,
6 while preserving "earned benefits as of the effective date of the Act." (Measure B, § 1502-A.)
7 The provisions of Measure B are carefully drawn to avoid taking away any earned and vested
8 benefits, and instead focus primarily on issues affecting active employees.

9 The stakes are enormous for the City, as future layoffs, pay and service reductions are the
10 primary budget options should the Court rule in favor of the unions. As the Court noted at the
11 hearing on the motion for summary adjudication, plaintiffs bear the burden of proof to prove that
12 their rights have been violated in some respect, and here, plaintiffs cannot meet their burden.
13 While the unions have actively sought to portray the Act as unfairly taking away their earned
14 contract rights, a methodical review of the Act and a full consideration of the evidence will show
15 that this is simply not true. The Court should effectuate the intent of the City's voters.

16 In addition to outlining the merits, and demonstrating why the City should prevail, this
17 brief contains a section listing the various procedural issues that the Court should consider at the
18 upcoming pretrial conference. (*See infra* § III.)

19 It is critical to approach the trial with the understanding that the sections comprised by
20 Measure B are expressly severable. (Measure B, § 1515-A.) Thus, the City's trial presentation
21 will be by issue categories, based on separate Measure B sections:²

22
23 ¹ A true and correct copy of Measure B is attached for the Court's convenience.

24 ² The City understands and respects the Court's ruling on the motion for summary adjudication of
25 issues. Here, the plaintiffs have the burden of proof, and the City understands the Court will
26 maintain an open mind to consider fully the issues based on a complete presentation of evidence.
27 In addition, only three issues were considered by the Court on the motion for summary
28 adjudication. The trial will encompass numerous issues that were not subject to the motion for
summary adjudication.

1 ***Issue: Reservation of Voter Authority (see infra § IV.C.1)***
2 **(Measure B, § 1504-A)**

3 In this section of Measure B, the voters have reserved their authority to consider any
4 changes related to pension and other employment benefits. Voter control over their charter and
5 municipal affairs is a fundamental right in charter cities. There is no reasonable way plaintiffs
6 can prevail on their challenge to this section.

7 ***Issue: Increased Contributions by Straight Wage Reductions or Payroll Deductions***
8 ***(See infra § IV.C.2)***
9 **(Measure B §§ 1506-A, 1514-A.)**

10 Measure B requires employees to help pay for the approximately \$2 billion unfunded
11 liability facing the plans. In sum, Measure B requires an additional 4% in employee contributions
12 per year, capped at 16%.

13 The contributions required by Measure B are made by one of two alternative means, set
14 forth in two separate and severable sections. First, employees can contribute through pre-tax
15 payroll deductions, with the amounts deposited directly into the members' retirement accounts.
16 (Measure B, § 1506-A). Alternatively, the City can gain budget savings through a wage reduction
17 – 4% per year, capped at 16%. (Measure B, § 1514-A.).

18 ***Section 1506-A***

19 For a period of time the City did have a policy of assuming responsibility for unfunded
20 liabilities facing the plans, and this is reflected in the Municipal Code. Faced with an
21 unprecedented economic crisis and unsustainable benefit cost increases, the City Council changed
22 its policy through ordinances adopted in 2010, and as negotiated with various labor unions. After
23 2010, unions began paying for unfunded liabilities through wage reductions.

24 The plaintiffs here all contend that the City entered into a contract commitment to pay
25 unfunded liabilities in perpetuity. Because there is nothing that says this expressly, the plaintiffs'
26 burden is to prove that this commitment is implied. Under *REAOC*, this is a "heavy burden," with
27 the Court obligated to "proceed cautiously" to determine under all of the circumstances whether
28 the City intended to commit itself to a permanent "irrevocable" benefit.

1 Here, plaintiffs cannot meet their "heavy burden" to show a vested right never to
2 contribute to the unfunded liabilities facing the retirement plans. The Charter reserved the right to
3 make changes (subject only to the Charter's expressly stated minimums); the unions agreed to
4 their members making additional contributions; and the contributions are comparably better than
5 the alternative – a straight wage reduction.

6 *Section 1514-A*

7 This section provides that if Section 1506-A does not go into effect, the City will simply
8 make straight wage reductions in order to generate the necessary savings. As a Charter City
9 having plenary authority under the California Constitution, this should not be a close question.
10 The City has the right to reduce employee compensation, and to hold otherwise would itself
11 violate the City's rights under the California Constitution. *See Butterworth v. Boyd*, 12 Cal. 2d
12 140, 146-47, 150-51 (1938).

13 There is one cause of action in this case challenging section 1514-A: the claim by
14 AFSCME and the SJPOA that this section "chills" their right to petition the courts. The City's
15 legitimate goals of lowering its costs to preserve City services defeats this claim. Moreover,
16 having sued the City within 24 hours of Measure B being approved by the voters, plaintiffs' claim
17 is untenable. As set forth herein, plaintiffs cannot prove this claim, and section 1514-A must be
18 held valid as a matter of law.

19 *Issue: Voluntary Election Program ("VEP") (see infra § IV.C.2.(a))*
20 *(Measure B, § 1507-A)*

21 The VEP permits employees to opt into a lower cost plan, and avoid making additional
22 contributions either through payroll deductions or wage reductions. Plaintiffs will be unable to
23 show that the VEP is unlawful.

24 *Issue: Disability Retirement Reforms (see infra § IV.C.3)*
25 *(Measure B, § 1509-A)*

26 Plaintiffs challenge two aspects of section 1509-A, as described below. This section was
27 not subject to the prior motion for summary adjudication.
28

1 *Section 1509-A(a)(b)*

2 These sections modify the definition of “disabled” so that employees must be unable to do
3 work as they did before, such that they cannot perform any other jobs in the City’s classification
4 plan. The evidence will show that the City’s earlier disability program resulted in unanticipated
5 and unfair outcomes, with employees retiring for disability but still able to work, who qualify for
6 service retirements simply converting them to disability retirements in order to get a tax
7 advantage, and then returning to work for different employers. Moreover, the City will offer
8 comparable advantages to address this change, including long term disability benefits, return to
9 work policies and workers’ compensation benefits. As set forth below, Measure B’s changes are
10 lawful.

11 *Section 1509-A(c)*

12 This section provides that disability retirement determinations shall be made by a panel of
13 independent experts, versus the Retirement Board. Not all plaintiffs challenge this section. As set
14 forth below, plaintiffs can have no vested right in administering the program. Plaintiffs will be
15 unable to meet their burden to show this section is unlawful.

16 ***Issue: COLA Cost Containment in the Event of an Emergency (see infra § IV.C.4)***
17 ***(Measure B, § 1510-A)***

18 The City’s retirement plans at issue in this case provide for a 3% per year cost of living
19 adjustment (“COLA”) regardless of actual inflation, or the state of the retirement trust. This
20 retirement feature has led to enormous and irrational benefit increases. Measure B, section 1510-
21 A, permits a temporary suspension of the COLA but only if the City Council declares a fiscal
22 emergency.

23 This claim is unripe in that the City has not declared a fiscal emergency, and has no present
24 plans to do so.

25 In any event, the doctrine permitting temporary contract impairments in the event of a
26 fiscal emergency is well established. Plaintiffs mount a facial challenge, and they will be unable
27 to meet the high burden of showing that this section necessarily and under all circumstances
28 violates Constitutional rights.

1 ***Issue: Discontinuing the Supplemental Retiree Benefit Reserve – “SRBR”***
2 **(see infra § IV.C.5)**
3 **(Measure B, § 1511-A)**

4 This issue was briefed in the summary adjudication motion. Although the Court ruled
5 against the City, the Court noted that there is a significant difference between the language in the
6 Federated plan, versus the Police and Fire plan. With respect to the Federated Plan, plaintiffs
7 challenge should be summarily decided in favor of the City.

8 A full airing of the evidence will demonstrate that Measure B’s action to return SRBR
9 funds to the retirement trust, in light of very irrational and unintended outcomes, is completely
10 lawful.

11 ***Issue: Equal Contributions Toward Retiree Health Care (see infra § IV.C.6)***
12 **(Measure B, § 1512-A(a))**

13 This issue was briefed in the summary adjudication motion, but the Court concluded that it
14 could not decide this issue under CCP § 437c without considering the “low cost plan” subsection.

15 The evidence will show that Measure B simply confirms the one to one contribution
16 requirement that is already in the Municipal Code. Moreover, Measure B is consistent with
17 numerous agreements made by the City with its labor unions. There is no legitimate basis to
18 invalidate this section.

19 ***Issue: Low Cost Plan Subsidy (see infra § IV.C.7)***
20 **(Measure B, § 1512-A(c))**

21 This section was not at issue in the summary adjudication motion. The section simply
22 confirms an existing Municipal Code section, linking the City’s retiree health premium subsidy
23 (100%) to the “lowest cost” plan available in the City. Plaintiffs’ cannot prove that this section
24 violates any vested right.

25 ***Issue: Reservation of Rights Regarding Retiree Healthcare***
26 **(see infra § IV.C.6(b))**
27 **(Measure B, § 1512-A(b))**

28 Again, this issue was not considered in the City’s previous motion. It simply declares the
City’s authority to amend, change or terminate plan provisions. This is a standard reservation of

1 rights, and plaintiffs cannot prove that it violates any rights.

2 ***Issue: Actuarial Soundness (see infra § IV.C.8)***
3 ***(Measure B, § 1513-A)***

4 This section requires that the plans be actuarially sound, while minimizing risks to the City
5 and its residents. Plaintiffs incorrectly contend that this section violates the Pension Protection
6 Act set forth in the California Constitution. In fact, the City Council has already adopted
7 ordinances confirming that this section shall be construed to be consistent with the Pension
8 Protection Act. There is no reasonable way for plaintiffs to prevail on this challenge.

9 ***Issue: City Council Discretion to Amend Any Provisions Found Ineffective***
10 ***(see infra § IV.C.9)***
11 ***(Measure B, § 1515-A)***

12 Finally, plaintiffs challenge Measure B's severability clause – specifically, its provision
13 conferring discretion on the City Council to remedy any deficiencies found by the Court. This
14 issue has not been previously considered by the Court. This section is entirely consistent with the
15 accepted principle letting government exercise discretion in complying with judgments.

16 As set forth herein, the City will prevail on each of the issues at issue in the upcoming trial.

17 **II. STATEMENT OF THE CASE**

18 **A. FACTUAL BACKGROUND**

19 Beginning in 2002, the City of San Jose began to experience serious budget shortfalls that
20 required layoffs, reduction in city services, and pay cuts for City employees.

21 In 2010, the City Auditor issued a report that concluded pension costs were unsustainable
22 and threatened City services, and later issued a report that concluded the disability retirement
23 system needed reform.³

24 In November 2011, the City came to the brink of declaring a fiscal emergency, saved only
25 by a last minute reduction in retirement costs related to the City's reduced workforce and pay cuts.

26 ³ The City Auditors' reports are entitled: "Pension Sustainability: Rising Pension Costs Threaten
27 the City's Ability To Maintain Service Levels – Alternatives For A Sustainable Future"
28 (November 2010); "Disability Retirement: A Program In Need of Reform" (April 2011).

1 In June 2012, when San Jose's voters enacted Measure B, the City's retirement funds faced
2 approximately \$1.5 billion in pension unfunded liabilities and \$2 billion in retiree healthcare
3 unfunded liabilities. To fund employee pension and retiree health care benefits, the City was
4 required to pay approximately \$250 million that year, about 23% of the City's general fund base
5 budget.

6 For employees enrolled in the Federated Retirement System, the City paid a combined rate
7 of 52% of pay, or an additional \$52,000 for every \$100,000 in salary; for employees enrolled in
8 the Police and Fire Retirement System, the City was required to pay a combined rate of 65% of
9 pay, or an additional \$65,000 for every \$100,000 in salary.⁴

10 In 2012, the retirement system actuaries predicted that these costs would rise over the next
11 few years, requiring the City to pay approximately \$320 million or more per year towards
12 employee retirement costs.

13 In the meantime, San Jose Federated employees are eligible to retire at age 55 with up to
14 75% of their salary payable for life, and Police and Fire employees are eligible to retire at age 50
15 with up to 90% of their salary for life. All retirees receive an automatic yearly 3% increase in
16 their pensions, which over 20 years results in a "raise" of well over 60%.

17 As an additional retirement benefit, for eligible employees, the retirement funds also pay
18 the full premium for retiree healthcare for the lowest cost plan, including the "family plan" offered
19 by the City. In 2013, this subsidy could be as high as \$13,600 per year for a "family plan." The
20 retirement funds also pay the full premium for dental care. As a result of these benefits, over 650
21 Federated retirees receive in excess of \$60,000 per year in pension in addition to the healthcare
22 and dental subsidy; over 500 Police and Fire retirees receive in excess of \$100,000 per year in
23 pension in addition to the healthcare and dental subsidy.⁵ Based on Retirement System records,
24

25 ⁴ These amounts are based on data reported in the Comprehensive Annual Financial Reports for
26 the Federated and Police and Fire Retirement Systems, for the period ending June 30, 2012.
Federated CAFR at pp. 48, 51; Police and Fire CAFR at pp. 49, 53.

27 ⁵ See Federated CAFR at p 123; Police and Fire CAFR at p. 125, for period ending June 30,
28 (footnote continued)

1 the highest Federated pension is \$174,152 per year; the highest police and fire pension is \$228,132
2 per year. Many San Jose retirees work full time after retirement, even those who retired for
3 disability.

4 In the meantime, by 2012, when Measure B was enacted, San Jose had eliminated 28% of
5 its budgeted positions through layoffs, retirements and resignations and had cut employee pay.
6 The impacts on city services included layoffs of dozens of firefighters and police officers, deferred
7 street maintenance, reduced library hours and delays in opening four new branch libraries,
8 curtailed services at community centers, delay in opening a new police substation, and other
9 impacts.⁶ Measure B seeks to control City costs for retirement, to preserve City jobs and services,
10 while maintaining employee retirement benefits. It achieves this by reducing employee
11 compensation to help pay for pension unfunded liabilities, providing alternative lower cost
12 pension plans, requiring employees to continue to share 50-50 towards retiree medical costs,
13 continuing the City's retiree medical subsidy in the amount of the "lowest cost" City plan, and
14 reallocating a supplemental retiree benefit reserve which was deepening the unfunded liabilities.

15 Measure B also includes structural reforms, including the requirement that future benefit
16 increases be submitted to the voters, that disability retirements be decided by an independent
17 expert panel, and that disability retirements be granted only to those truly unable to work.

18 **B. PROCEDURAL BACKGROUND**

19 On June 5, 2012, the City's voters passed Measure B, which added Article XV-A, a
20 pension reform measure, to the San Jose City Charter. Six sets of plaintiffs filed suit challenging
21 sections of Measure B, and the City cross-complained for declaratory relief. All cases are
22 consolidated for trial.⁷

23
24
25 2012.

26 ⁶ Office of the City Auditor, "Ten Years Of Staffing Reductions At The city Of San Jose:
Impacts And Lessons Learned" (November 2012), pp. i, 5.

27 ⁷ The six sets of plaintiffs are: (1) the San Jose Police Officers Association ("SJPOA"), who
28 represents employees who are members of the 1961 San Jose Police and Fire Department
(footnote continued)

1 As a group, plaintiffs seek declaratory and injunctive and/or mandamus relief prohibiting
2 the City from applying twelve separate sections of Measure B based on state constitutional claims
3 of contractual impairment, violation of due process, takings, right to petition, bill of attainder,
4 equitable estoppel, and other claims. The City seeks declaratory relief as to the validity of
5 Measure B under federal constitutional provisions. To date, the Court has ruled as follows on
6 motions brought by the parties:

7 On January 21, 2013, the Court granted without leave to amend the City's motion for
8 judgment on the pleadings as to the SJPOA's seventh cause of action for violation of the Meyers-
9 Milius-Brown Act ("MMBA"). On March 15, 2013, the Court denied plaintiffs' motion for a
10 preliminary injunction. On April 30, 2013, the Court sustained without leave to amend the
11 defendants' demurrer to AFSCME's seventh cause of action for illegal ultra vires tax, fee or
12 assessment. On June 21, 2013 the Court denied the City's motion for summary adjudication
13 brought in connection with three sections of Measure B.

14 **III. TRIAL PROCEDURES**

15 Trial is set for five days beginning July 22, 2013, and concluding on July 26, 2013. The
16 parties stipulated to each side (all plaintiffs on one side, and the City on the other) having equal
17 trial time with a limit of 15 witnesses per side. The City representative will be Deputy City
18 Manager, Alex Gurza. Deborah Figone, the City Manager, will be present also, as she is a named
19 party. The City may call custodians of records, if necessary, to authenticate certain exhibits.

20
21 Retirement Plan ("Police and Fire Plan"); (2) the American Federation of State, County, and
22 Municipal Employees, Local 101 ("AFSCME"), who represents employees who are members of
23 the 1975 Federated City Employees' Retirement Plan ("Federated Plan"); (3) Robert Sapien, Mary
24 Kathleen McCarthy, Thanh Ho, Randy, Sekany, and Ken Heredia, who are active and retired
25 members of the Police and Fire Plan (collectively, "Sapien Plaintiffs"); (4) Teresa Harris, Jon
26 Reger, and Moses Serrano, who are active and retired members of the Federated Plan
27 (collectively, "Harris Plaintiffs"); (5) John Mukhar, Dale Dapp, James Atkins, William
28 Buffington, and Kirk Pennington, who are active and retired members of the Federated Plan
(collectively, "Mukhar Plaintiffs"); and (6) the San Jose Retired Employees Association, Howard
E. Fleming, Donald S. Macrae, Frances J. Olson, Gary J. Richert, and Rosalinda Navarro, who are
retired members of the Federated Plan (collectively, "Retiree Plaintiffs").

1
2 The City requests that various issues be resolved at the upcoming pretrial conference set
3 for July 12, 2013.

4 **A. Video / Audio Taping:** The City is committed to transparency, and is making a
5 request on behalf of a media agency, CreaTV, to permit audio and video taping in order to ensure
6 that the public understands the issues and evidence. While labor unions and many public
7 employees are apparently rooting against Measure B, the City's residents and taxpayers are
8 stakeholders and have an equally strong interest in the outcome.

9 The City requested defense counsel to consent, however, at least two objections were
10 expressed, one by *AFSCME* counsel, and one by *Sapien* counsel. The City is filing a separate
11 motion on this issue.

12 **B. Time Clock Trial:** There is no legitimate basis for a long, drawn out trial in this
13 case. The legal issues predominate -- interpretation of the City Charter, memoranda of
14 understanding and other City enactments. In order to stay within the five day limit, the City
15 proposes a time clock trial with each side having 12 hours per side to put on its case, including
16 opening statements. This is clearly within the authority of the court, and will serve to streamline
17 the evidence and facilitate an efficient presentation of evidence. *See* Cal. Ev. Code §§ 320
18 (authority to regulate order of proof); 765(a)(authority to control mode of interrogation); *Nazir v.*
19 *United Airlines, Inc.*, 178 Cal.App.4th 243, 289-90 (2009) (court's inherent powers over the
20 vagaries of the litigation process).

21 **C. Closing Arguments / Post Trial Briefing:** The Court should set a post hearing
22 briefing schedule. The City suggests three weeks after receipt of the trial transcript. The City
23 proposes that the parties waive closing arguments in light of the post hearing briefs (and the fact
24 that this is a bench trial) in order to save time.

25 **D. Witness Identification and Order:** The City requests that the plaintiffs identify
26 their order of witnesses, so that the City may prepare. The City requests the accommodation of
27 one expert -- John Bartel -- whose schedule permits his attendance only on the last day of trial, July
28 26. The City suggests that Mr. Bartel be scheduled to testify in the morning of July 26. In

1 addition, plaintiffs have identified a City witness – Donna Busse – to testify. Ms. Busse is out of
2 town July 25 -26. If she is needed to testify, her testimony must be completed by July 24.

3 **E. Witness Exclusion:** The City requests that all potential witnesses be excluded
4 from the courtroom.

5 **F. Miscellaneous:** The City assumes that the Court will set the trial times at the
6 pretrial hearing on July 22. The City is open to other means of expediting trial. The City has
7 invited the plaintiffs to meet after the pretrial conference on July 12 to work on stipulating to
8 exhibits that will be admitted into evidence. The Court should consider holding a final pretrial
9 conference on July 20, as there is already a hearing scheduled on *in limine* motions involving
10 experts.

11 **IV. LEGAL ARGUMENT**

12 **A. PLAINTIFFS HAVE THE BURDEN OF PROOF AT TRIAL ON ALL** 13 **CLAIMS**

14 In contrast to the burden in the prior summary adjudication motion, Plaintiffs now have the
15 burden of proof. Plaintiffs must overcome the presumption that Measure B is legal. “All
16 presumptions favor the validity of a statute. The court may not declare it invalid unless it is clearly
17 so.” *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1084 (1995). Because plaintiffs bring a facial
18 challenge to all or part of Measure B, “petitioners must demonstrate that the act’s provisions
19 inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.” *Id.*

20 To meet the initial threshold requirement of establishing an entitlement to the particular
21 property or contractual right at issue, it is plaintiffs’ “heavy burden” to demonstrate “the
22 legislative body’s intent to create vested rights.” *Retired Employees Association of Orange*
23 *County, Inc., v. County of Orange (REAOC)*, 52 Cal. 4th 1171, 1190 (2011); *Vielehr v. State of*
24 *California*, 104 Cal. App. 3d 392, 397 (1980) (emphasizing plaintiff’s burden to show a
25 “retirement right”).

26 To do so, plaintiffs have the burden of overcoming the presumption “that a statutory
27 scheme is not intended to create private contractual or vested rights.” *REAOC*, 52 Cal. 4th at
28 1186. To overcome this presumption, plaintiffs must prove that the “statutory language or

1 circumstances ... “clearly’ ... evince a legislative intent to create private rights of a contractual
2 nature enforceable against the [governmental body].” *Id.* at 1186-87. “[T]o construe laws as
3 contracts when the obligation is not clearly and unequivocally expressed would be to limit
4 drastically the essential powers of a legislative body.” *Id.*

5 **B. THE CITY CHARTER CONTROLS OVER ALL OTHER CITY LAWS**
6 **AND CANNOT BE NULLIFIED BY ORDINANCE**

7 The City Charter contains two reservation of rights clauses that permit the City to “amend
8 or otherwise change” its retirement plans and to “repeal or amend” any retirement systems.
9 (Charter sections 1500, 1503) These Charter provisions trump the City’s Municipal Code
10 provisions on retirement and preclude the creation of the vested rights claimed in this case.

11 In deciding the City’s Motion for Summary Adjudication, under which the City had the
12 initial burden of proof, the Court found that the Charter contained a reservation of rights but also
13 permitted the City to enact retirement plans by ordinance, potentially creating vested rights.
14 (Order at p. 5.) At trial, however, plaintiffs have the burden of proving that the City in fact
15 intended to create vested rights through the Municipal Code. Plaintiffs cannot meet that burden
16 for several reasons, including because the Charter’s reservation of rights cannot be nullified by
17 ordinance.

18 “We begin with the cardinal principle that the charter represents the supreme law of the
19 City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive
20 state law.” *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 170 (1994), citing Cal.
21 Const., art. XI, §3(a). From this principle flow several others:

22 -- “The provisions of the City Charter supercede all municipal laws, ordinances, rules or
23 regulations inconsistent therewith.” *Stuart v. Civil Service Com.*, 174 Cal.App.3d 201, 206
24 (1985) (civil service rule in conflict with Charter was void).

25 -- “An ordinance can no more change or limit the effect of a charter than a statute can
26 modify or supersede a provision of the state Constitution.” *Lucchesi v. City of San Jose*, 104
27 Cal.App.3d 323, 328 (1980) (city ordinance granting preference to city employees in hiring was in
28 conflict with City Charter and therefore void).

1 --Where a charter confers on the legislative body "discretionary power" to deal with a
2 subject, an ordinance cannot "alter or limit this power." *City and County of San Francisco v.*
3 *Patterson*, 202 Cal.App.3d 95, 105 (1988) (board's charter power to sell or lease property could
4 not be altered by ordinance); *Citizens for Responsible Behavior v. Superior Court*, 1 Cal.App.4th
5 1013, 1034 (1991) (city council's plenary power to address discrimination could not be limited by
6 ordinance).

7 Based on this hierarchy, plaintiffs cannot show that the City gave up legislative control
8 over unfunded liabilities, or any other issue presented by Measure B. The San Jose Charter
9 reserves the City's right to "amend or otherwise change" the City's retirement plans; the Charter
10 supersedes all municipal ordinances on retirement; an ordinance cannot "change or limit" the
11 Charter's reservation of rights; and a City Council's discretionary authority cannot be limited by
12 ordinance. To hold otherwise would render the Charter's reservation of rights meaningless.

13 Based on the Charter's reservation of rights, this case is controlled by *Walsh v. Board of*
14 *Administration*, 4 Cal.App.4th 682, 700 (1992), which held that "modification of a retirement plan
15 pursuant to a reservation of the power to do so is consistent with the terms of any contract
16 extended by the plan and does not violate the contract clause of the federal constitution."

17 Importantly, Measure B does not change any pension or retiree health benefit, making
18 plaintiffs' contentions on these issues irrelevant. At trial, as to the issues presented by Measure B,
19 the City will show that the City Charter's reservation of rights and legislative history demonstrate
20 an intent to preserve City flexibility over the City's cost of its retirement plans -- a flexibility that
21 cannot be taken away by ordinance.

22 **C. PLAINTIFFS CANNOT MEET THEIR BURDEN TO PROVE THAT**
23 **MEASURE B VIOLATES THE STATE OR FEDERAL CONSTITUTION.**

24 Plaintiffs cannot meet their heavy burden to invalidate each of the provisions of Measure B
25 at issue in this consolidated case.⁸ Plaintiffs cannot show that any section impairs contractual
26

27 ⁸ Plaintiffs do not challenge Sections 1501-A [voter intent], 1502-A [Findings], 1503-A [authority
28 (footnote continued)]

rights, violates due process or violates any other constitutional requirements.

1. Plaintiffs Cannot Meet Their Burden To Prove The Illegality Of Section 1504-A, Which Requires Retirement Plan Changes To Be Submitted To The Voters.

Section 1504-A reserves voter authority to “consider any change in matters related to pension and other post-employment benefits,” and requires voter approval for any increases to pension or retiree healthcare benefits, other than Tier 2 benefit plans. (Measure B, Section 1504-A.)⁹ Only the Retiree Plaintiffs challenge this section, claiming that it violates their vested right to the City Council having the authority to grant increases in retirement benefits. Plaintiffs cannot prove this contention.

Article XI, section 5(b)(4) of the California constitution grants “plenary authority” for a city charter “to provide therein or by amendment thereto” for the “compensation” of city officers and employees.¹⁰ Given this plenary authority, a city charter may require electoral approval of the compensation of city officers and employees. See *Munoz v. City of San Diego*, 37 Cal. App. 3d 1, 4 (1974) (upholding city charter provision that required council member salaries to be decided by

for City Council to implement], 1505-A [reservation of rights to City Council], or 1508-A [Tier II retirement plan for new employees].

⁹ Similar provisions are found in other City Charters, including San Diego and San Francisco.. See City of San Diego City Charter, Section 143.1(d) (“The requirement for voter approval of retirement system benefit increases shall become operative on January 1, 2007, for all proposed increases in retirement system benefits tentatively agreed upon by the City on or after that date.”); *United Public Employees v. City and County of San Francisco*, 190 Cal. App. 3d 419, 422-423 (1987) (charter provision required “voter approval of any ‘addition, deletion or modification’ of city employee benefits”).

¹⁰ Article XI, Section 5(b) states: “It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) *plenary authority is hereby granted*, subject only to the restrictions of this article, *to provide therein or by amendment thereto*, the manner in which, the method by which, the times at which, and the terms for which the several *municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation*, and for the number of deputies, clerks and other employees that each shall have, and *for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.*” [Emphasis added]

1 the electorate "because it has been constitutionally committed to a political department of
2 government, i.e., the electorate, and not to the courts"). Retirement benefits relate to
3 compensation. *Downey v. Board of Administration*, 47 Cal.App.3d 621 (1975) ("It is clear that
4 provisions for pensions relate to compensation and are municipal affairs within the meaning of the
5 Constitution"). Therefore, Article XI, section 5(b) permits the voters to provide "by amendment"
6 for voter approval of any increases in employee retirement benefits. The state constitution
7 expressly grants the City's voters the authority to enact such a measure.¹¹

8 **2. Plaintiffs Cannot Meet Their Burden To Prove The Illegality Of**
9 **Section 1506-A, Or Of Section 1514-A, Which Reduce Employee**
10 **Compensation For The Purpose Of Reducing The City's Cost Of**
11 **Pension Unfunded Liabilities.**

12 Sections 1506-A and 1514-A seek to reduce the City's yearly cost of pension plan
13 unfunded liabilities by requiring employees to share in the cost through compensation reductions.
14 Section 1506-A requires increased employee contributions toward unfunded liabilities, not to
15 exceed 4% of pensionable pay per year up to a maximum of 16%. (Measure B, §1506-A) If
16 employees cannot be required to make additional pension contributions, Section 1514-A requires
17 that employee wages be reduced in equivalent amounts. (*Id.*, §1514-A). Employees who do not
18 wish to pay the cost of the existing plan have the option of selecting an alternative, lower cost,
19 retirement plan.¹² (*Id.*, §1507-A) The City's motion for summary adjudication addressed Section
20 1506-A, but not the wage reduction contained in Section 1514-A.

21 In drafting Measure B, the City made increased employee contributions the preferred
22 alternative, as it is more beneficial to employees than decreased pay. Section 1506-A(e) provides
23 that the additional contributions are to be treated the same as "other employee contributions,"

24 ¹¹ Even if the law were not clear, plaintiffs cannot prove the necessary ripeness required before
25 this issue can be adjudicated. *Pacific Legal Foundation v. California Coastal Commission*, 33
26 Cal.3d 158, 170, 173 (1982) (dispute must be "concrete"). Plaintiffs have not, and cannot, point to
27 any particular proposal that the City has asserted must be presented to the voters. Here, plaintiffs
28 would be asking the court to "speculate on the resolution of hypothetical situations" that may or
may not occur. *Id.*

¹² The alternative plan or VEP is subject to IRS approval, which the City is working to obtain.

1 meaning they will be "made on a pre-tax basis through payroll deductions pursuant to applicable
2 Internal Revenue Code Sections," and they will be "subject to withdrawal, return and redeposit" as
3 are "any other employee contributions." (Section 1506-A) This means that 1) pensionable pay
4 will remain greater than if pay were reduced, which results in larger pensions at retirement,¹³ and
5 2) employees will recover these increased contributions if they leave prior to retirement, an
6 amount that would be lost otherwise if there were a pay reduction.

7 At trial, city officials and experts will testify to the financial benefits of the increased
8 contribution rates over decreased wages. Plaintiffs and their experts have conceded this fact in
9 declarations and depositions. (*See e.g.*, Declaration of Dan Doonan, AFSCME expert witness
10 ("while pay cuts affect employees' pensionable wages, higher contributions towards retirement
11 benefits do not"); Declaration of Franco Vado, SJPOA official ("SJPOA agreed to the increased
12 pension contribution because we considered it a more favorable form of concession than a wage
13 cut"). In either case, plaintiffs cannot meet the burden of proving a vested right.

14 (a) **Plaintiffs Cannot Prove The Illegality Of Section 1506-A**
15 **Because They Cannot Prove That The City Gave Up All**
Legislative Control Over Employee Pension Contribution Rates.

16 In its order denying the City's Motion for Summary Adjudication, the Court relied on
17 Municipal Code sections that required the City to pay for pension plan unfunded liabilities, and
18 found that the City had not met its burden to show otherwise. However, at trial, where plaintiffs
19 have the burden, plaintiffs will be unable to show that in enacting these Municipal Code sections
20 the City "'clearly' ... evince[d] a legislative intent to create private rights of a contractual nature
21 enforceable against" the City, i.e., a legislative intent that the City committed itself to pay all
22 unfunded liabilities in perpetuity. *REAOC*, 52 Cal. 4th at 1186-87. The evidence at trial will
23 show the following:

24 First, as demonstrated above in Section IV(B), the City Charter's reservation of rights
25

26
27 ¹³ And also permits premium pay, for example for special skills or duties, based on a percentage
28 of pay to be greater.

1 precludes creation of a vested right through enactment of the Municipal Code.

2 Second, the Municipal Code sections relied upon by plaintiffs contain no language
3 showing an intent to create a vested right. Compare *Teachers' Retirement Board v. Genest*, 154
4 Cal.App.4th 1012, 1022 (2007) (express intent to enact payments "as vested benefits pursuant to a
5 contractually enforceable promise to make annual contributions"). Nor do the circumstances
6 surrounding the enactment of these sections show any intent to create a vested right no matter
7 what the cost to the City. Actuarial reports show that in the 1970's when these Municipal Code
8 sections were first enacted, and until recent times, the pension funds were well funded and the
9 City's payments for unfunded liabilities zero or minimal.

10 Third, although the Court's summary adjudication order stated that the City had not
11 identified an ordinance requiring employees to pay for unfunded liabilities, the City in fact did
12 enact such ordinances. In 2010, when the City's payment for unfunded liabilities skyrocketed, the
13 City amended the Municipal Code to authorize "additional" employee *contributions to be used to*
14 *offset the City's pension contributions* which include unfunded liabilities. (Municipal Code
15 3.28.755, 3.28.955 [Federated Plan], 3.36.1525(C) [Police and Fire Plan]). Therefore, plaintiffs
16 cannot show any intent by the City to always carry the unfunded liabilities. Moreover, plaintiffs
17 never sued to invalidate these ordinances, and the statute of limitations has run. See *Canova v.*
18 *Trustees of Imperial Irrigation Dist. Employee Pension Plan*, 150 Cal. App. 4th 1487, 1497-98
19 (2007) (pension-related claim untimely under Government Claims Act); *Mason v. Retirement Bd.*,
20 111 Cal. App. 4th 1221, 1229, 1232 (2003) ("A challenge to the validity of an ordinance must
21 normally be brought within three years," and giving "substantial deference" to interpretation of
22 retirement provisions that had "never been formally challenged prior to the present suit").

23 Finally, trial evidence will show that the City and its employee unions both considered
24 employee contribution rates to be elements of employee compensation, subject to bargaining, and
25 thus not vested. In 2010, when the City faced a \$2 billion pension liability, unions proposed and
26 agreed to employees paying "additional" contribution rates to defray the costs of unfunded
27 liabilities. Based on this conduct, plaintiffs are estopped from contending that they have a vested
28 right to the City paying for all unfunded liabilities. *San Bernardino Public Employees Ass'n v.*

1 *City of Fontana*, 67 Cal.App.4th 1215, 1223-26 (1998) (unions could not bargain over an item and
2 claim after agreement that those items were vested and non-negotiable). Later unions agreed to
3 lower wages to defray City costs of unfunded liabilities. This conduct demonstrates that the
4 unions considered contribution rates and wages to be forms of compensation, to which there are
5 no vested rights. *San Diego Police Officers Ass'n v. San Diego City Employees Retirement*
6 *System*, 568 F.3d 725 (9th Cir. 2009).¹⁴

7 For these reasons, plaintiffs cannot prove a vested right to the City paying for all unfunded
8 liabilities.¹⁵ However, in the event the Court determines that the City cannot require employees to
9 pay additional pension contributions, Measure B requires employees to pay the equivalent in
10 reduced wages, which is plainly legal.

11

12

13

14

15 ¹⁴ Case law recognizes that unions cannot negotiate away the vested rights of their members. *San*
16 *Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal.App.4th at 1225 ("a collective
17 bargaining unit may not bargain away individual statutory or constitutional rights which flow from
18 sources outside the collective bargaining agreement itself") (citing cases); *Allied Chemical and*
19 *Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 n.20, 92 S.Ct. 383, 30
L.Ed.2d 341 (1971) ("Under established contract principles, vested retirement rights may not be
altered without the pensioner's consent"). For example, no plaintiff has suggested that the union
could negotiate a reduction in a pension benefit.

20 ¹⁵ Even if the Court finds that the Municipal Code created a vested right to the City paying for all
21 unfunded liabilities, the Court must still consider whether this section of Measure B was
22 "reasonable and necessary to serve an important public purpose." *Board of Administration v.*
23 *Wilson*, 52 Cal.App.4th 1109, 1154 (1997). "An employee's vested contractual rights may be
24 modified prior to retirement for the purpose of keeping a pension system flexible to permit
25 adjustments in accord with changing conditions and at the same time maintain the integrity of the
26 system. *Id.* at 1132. "To be sustained as reasonable, alterations of employees' pension rights
27 must bear some material relation to the theory of a pension system and its successful operation,
and changes in a pension plan which result in disadvantage to employees should be accompanied
by comparable new advantages." *Id.* at 1132-33. The evidence at trial will show that employees
are paying for unfunded liabilities in the form of decreased wages. And Measure B itself provides
for mandatory wage decreases to fund pension plan unfunded liabilities. Given those realities, the
payment by employees of an increased contribution rate, which is more beneficial than a wage cut,
is a "comparable new advantage."

28

(i) Under The State Constitution, The City Has Plenary Authority Over Employee Compensation

These cases follow the seminal decision in *Butterworth v. Boyd*, 12 Cal.2d 140 (1938) where the California Supreme Court expressly held that a City Charter amendment did not violate employees' vested rights by requiring compulsory salary deductions to fund a health service system. *Butterworth v. Boyd*, 12 Cal.2d at 150. "The charter governs the salaries of city employees; by the amendment to the charter, in force at the time the municipal salaries were fixed for the current fiscal year, the deduction was authorized and made accordingly. It is well settled that public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority." *Id.* Based on this unbroken line of authority, the City Charter may reduce salaries without violating vested rights.

The only argument remaining is the contention by AFSCME and the SJPOA that Section 1514-A “chills” their right to petition the courts, because if they successfully challenge the increased contribution rates of Section 1506-A, their pay will be decreased under Section 1514-A. But they cannot prove this cause of action.

The right to petition is a variant on the right to free speech. *Vargas v. City of Salinas*, 200

1 Cal.App.4th 1331, 1345 (2011). Plaintiffs must prove that their legal challenge to increased
2 contribution rates involves a matter of “public concern,” and that Measure B restricts their legal
3 challenge. *Id.* at 1345-1346.¹⁶ If they make this showing, the City can defeat the claim by showing
4 that the pay cut in the Savings Clause “was ‘narrowly drawn to achieve a substantial governing
5 interest that is content neutral and unrelated to the suppression of the exercise of First Amendment
6 rights.” *Id.* at 1346 (no infringement of right to petition by award of attorney fees against
7 petitioner and in favor of government in connection with anti-SLAPP motion).

8 Here, it is obvious that the City enacted Measure B, and the requirement that employees
9 pay towards unfunded liabilities, in order to “achieve a substantial governing interest” – to protect
10 City jobs and services. Measure B’s requirement that employees make additional contributions in
11 the form of wages is “content neutral” and “unrelated to the suppression of the exercise of First
12 Amendment rights.” *Id.*

13 Courts look to “reasons advanced” in the statute’s “statement of legislative purpose” in
14 evaluating the government’s interest. *Simpson v. Municipal Court*, 14 Cal. App.3d 591, 597-598
15 (1971) (relying on legislative findings in right-to-petition case). Measure B itself states that it is
16 intended to achieve savings in order to “protect[] the City’s viability and public safety, at the same
17 time allowing for the continuation of fair post-employment benefits for its workers.” § 1501-A.

18 Moreover, the City did not try to suppress litigation; in fact, prior to the enactment of
19 Measure B the City Council enacted a resolution calling on the City to initiate litigation to resolve
20 the legality of the additional employee contribution rates. And the City did so; on June 5, 2013,
21 the day the measure passed, the City filed suit in federal court on both state and federal grounds to
22 test the legality of Measure B. Nor were plaintiffs deterred from filing litigation, evidenced by the
23

24 ¹⁶ Plaintiffs cannot do so because their claim is limited to personal increased contribution rates, as
25 opposed to claims about Measure B’s effect on the City’s “general functioning or safety,” and is
26 therefore a matter of private rather than public concern. *White v. Nevada*, 312 Fed. Appx. 896,
27 897 (9th Cir. 2009) (complaints about holiday overtime pay not a matter of public
28 concern). Moreover, given the multiple lawsuits filed, plaintiffs cannot prove that Measure B
deterred them from filing suit over increased contribution rates.

1 filing of six lawsuits in this Court.

2 Plaintiffs rely primarily on *California Teachers Ass'n v. State of California*, 20 Cal. 4th
3 327 (1999), which is completely inapposite here. *California Teachers* involved a statutory
4 requirement that a fired or suspended teacher pay half the cost of the hearing officer considering
5 the teacher's appeal. The Court held that this unprecedented burden was not supported by a
6 legitimate state interest because it discouraged nonfrivolous appeals. *Id.* at 331, 333, 346. Here,
7 in contrast, the City's interest is absolutely legitimate: a salary reduction that frees City resources
8 to pay for essential City services. Plaintiffs, who have the burden, cannot prove otherwise. In
9 *Zuckerman v. State Bd. of Chiropractic Examiners*, which distinguished *California Teachers*, the
10 California Supreme Court found that reducing "operating costs" so it could "better achieve its
11 statutorily mandated purpose" was a legitimate goal. *Zuckerman*, 29 Cal. 4th 32, 40-43 (2002)
12 ("The United States Supreme Court has held that the public's interest in 'conserving scarce fiscal
13 and administrative resources' is a legitimate goal").

14 Not only may the City decrease wages to pay for unfunded liabilities, it would be illegal
15 for the Court to enjoin the City from doing so. Under California constitution Article XI, section
16 5(b), as demonstrated above, the City has the plenary authority to decrease employee
17 compensation to help pay for the retirement plans' unfunded liabilities or to otherwise help restore
18 and maintain City services. This is a legitimate goal unrelated to access to the courts or free
19 expression.

20 (c) **Plaintiffs Cannot Meet Their Burden To Prove The Illegality Of**
21 **Section 1507-A, Which Provides An Lower Cost Alternative**
 Plan For Employees

22 Section 1507-A provides for the one-time Voluntary Election Program ("VEP"), an
23 alternative retirement plan, contingent on IRS approval, for employees who are members of the
24 existing retirement plans, but who choose to avoid the increased contribution rate or pay reduction,
25 in exchange for less generous retirement benefits. (Section 1507-A(c).) Plaintiffs attack this plan
26 as presenting a "Hobson's Choice" – employees must pay higher contribution rates, or take lower
27 wages, unless they enter this plan. Therefore, any challenge to this section is a repetition of
28 plaintiffs' challenge to Sections 1506-A and 1514-A. Plaintiffs cannot prove that there is anything

1 intrinsically illegal about an alternative plan.¹⁷

2 **3. Plaintiffs Cannot Meet Their Burden To Prove The Illegality Of**
3 **Section 1509-A, Which Requires An Independent Board To Decide On**
4 **Disability Retirements And Requires Employees To Be Unable To**
5 **Work In Order To Obtain A Disability Retirement**

6 **(a) Plaintiffs Cannot Prove That The Change To An Expert Board**
7 **Violates Vested Rights**

8 Currently, disability retirement determinations are made by retirement board members,
9 who include a simple majority of members of the public, as well as employees and retirees who
10 are members of the retirement plans. Measure B requires instead that disability determinations be
11 made by an independent panel of medical experts.

12 The plaintiffs do not have a vested right in administering the disability retirement program,
13 let alone in the composition of the body that makes disability determinations. *Claypool*, 4
14 Cal.App.4th at 670, 680 (“although active and retired members have a vested right to a pension,
15 they do not have a vested right to control the administration of the plan which provides for the
16 payment of pensions”), citing *Whitmire v. City of Eureka*, 29 Cal.App.3d 28, 34 (1972) (where
17 “only administrative and procedural changes ” were involved, ordinances restructuring the
18 Commission charged with administering the police and fire retirement system did not violate
19 vested rights).

20 **(b) Plaintiffs Cannot Prove That The Limitation Of Disability**
21 **Pensions To Those Unable To Work Violates Vested Rights.**

22 Section 1509-A also reforms the eligibility requirements for obtaining a disability
23 retirement by requiring that employees be unable to work. For Federated employees, the
24 employee must be unable “to perform any other jobs described in the City’s classification plan”;
25 for Police and Fire employees, the employee must be unable to “perform any other jobs in the
26 City’s classification plan in the employee’s department.” (Section 1509-A(b).)

27 ¹⁷ The City has not yet obtained IRS approval and has stipulated so with plaintiffs.
28

1 Previously, employees could obtain a disability retirement if they could not do their own
2 job or any other job in their classification offered to them by the City. An April 2011 report by the
3 City Auditor found that this definition had led to abuses:

- 4 • Of "22 sample cases in which the boards approved a disability retirement," all 22 were
5 still able to work with work restrictions that "the boards' Medical Director found to be
6 'prophylactic,'" but "in only three cases was the City able to find an appropriate job for
7 the employee . . ." (Audit, p. 25.)
- 8 • "In San José, 2 out of 3 Fire personnel, and more than 1 out of 3 Police personnel are
9 retiring on service-connected disability . . . These sworn disability retirement rates are
10 higher in San José than elsewhere." (Audit, p. 9.)
- 11 • Some employees who were granted disability retirements were working full time in
12 their regular job right up to when they separated from the City; others were working
13 full time in modified duty positions." (Audit, p. 9.)

14 The City Auditor's Report recommended that

15 [T]he City Council consider amending the City Charter and the Municipal Code to
16 clarify that the purpose of the disability retirement benefit is to provide a stable
17 source of income for employees who are incapable of engaging in any gainful
18 employment but are not yet eligible to retire (in terms of age or years of service),
and to limit disability retirement benefits to those employees who are incapable of
engaging in any gainful employment. (Audit, p. 26.)

19 Plaintiffs claim that the change in the eligibility criteria violates their vested rights because
20 it denies them a disability retirement if they can do any job, even a clerk's job, with no
21 requirement that it be offered. But they cannot prove their case.

22 First, Measure B provides countervailing advantages for any disadvantage: 1) for police
23 and fire, drastic decrease in the time of duration of the disability from "permanent" and "at least
24 until the disabled person attains the age of fifty-five (55) years" to "at least one year" (compare
25 Charter, § 1504(d) to Measure B, § 1509-A(b)); and 2) the potential of long-term disability
26 insurance for work-related injuries. (Measure B, § 1509-A(d); *see Gatewood v. Board of*
27 *Retirement*, 175 Cal.App.3d 311, 320-321 (1985) (system may substitute disadvantages with
28 comparable advantages).

1 At trial, the City will show that it plans to implement a package of policies, including the
2 existing Worker's Compensation program, better implementation of the City's Return To Work
3 policy, and long term disability insurance, that will provide alternatives for the employee who
4 cannot do the employees' current job but is still able to work. This is a complex area and the
5 Court "must be mindful not to interfere with the legislative process before it plays out...." *Costa*
6 *Mesa City Employees Ass'n v. City of Costa Mesa*, 209 Cal. App. 4th 298, 308 n.2 (2012).

7 Second, Measure B's change in definition restricts the parties to their reasonable
8 expectations for the program. *Walsh*, 4 Cal.App.4th at 697. The benefit itself is not changed.
9 *Frank v. Bd. of Admin.*, 56 Cal.App.3d 236, 243 (1976) (vested rights violation where change was
10 to benefits (decrease in monthly allowance from \$475 to \$90) rather than eligibility). Rather,
11 Measure B *changes only the definition* for eligibility purposes to restore the original purpose of
12 disability retirements. *Gatewood*, 175 Cal.App.3d at 320-321 (upholding definition change on
13 three independent grounds).

14 **4. Plaintiffs Cannot Meet Their Burden To Prove The Illegality Of**
15 **Section 1510-A, Which Permits The City To Suspend COLA Payments**
In The Event Of A Fiscal and Service Level Emergency

16 Section 1510-A permits (but does not mandate) adoption of certain emergency measures *if*
17 the City Council "adopts a resolution declaring a fiscal and service level emergency, with a
18 finding that it is necessary to suspend increases in cost of living payments to retirees." The
19 emergency measures are 1) temporary suspension of COLAs, in whole or in part, for up to five
20 years (1510-A(a)); 2) prospective restoration of the COLAs, in whole or in part, if the Council
21 determines the fiscal emergency has eased (1510-A(a); and 3) restored COLAs that do not exceed
22 the existing COLAS.¹⁸

23 Implementation of this section is dependent on the Council adopting a resolution declaring
24 a fiscal and service level emergency. The law of vested rights acknowledges that even vested
25

26 ¹⁸ The COLAs would be 3% for current retirees and for employees who did not opt into the VEP
27 and restored COLAs that do not exceed 1.5% for employees who opted into the VEP or who are in
28 Tier 2. These are the existing yearly COLA increases, and not a decrease in the COLAs. See ____.

1 rights may be suspended in the event of an emergency. *Valdes v. Cory*, 139 Cal.App.3d 773, 790-
2 791 (1983) (listing factors identified by both the California and United States Supreme Courts
3 “which may warrant legislative impairment of vested contract rights on the grounds of necessity”
4 and citing cases). But the legality of the City’s actions cannot be determined until the City adopts
5 an emergency resolution. Until then, it is impossible to determine how the Council would exercise
6 its discretion under this section. This claim is not ripe. *City of Santa Monica v. Stewart*, 126
7 Cal.App.4th 43, 63-66 (2005).

8 Plaintiffs complain that this section is defective on its face, because it does not require the
9 City to pay back COLA payments suspended during the emergency. This is not a basis to
10 invalidate this section, because there is no language that prohibits the City from paying back the
11 suspended payments when the emergency is over. Under *Tobe*, to succeed on a facial challenge,
12 “petitioners must demonstrate that the act’s provisions inevitably pose a present total and fatal
13 conflict with applicable constitutional prohibitions.” *Tobe v. City of Santa Ana*, 9 Cal.4th at 1084.
14 They cannot do so.

15 **5. Plaintiffs Cannot Meet Their Burden To Prove The Illegality Of**
16 **Section 1511-A, Which Discontinues The Supplemental Retiree Benefit**
Reserve

17 Section 1511-A discontinued the Supplemental Retiree Benefit Reserve (SRBR), and
18 returned its assets “to the appropriate retirement trust fund.” It does not foreclose the possibility
19 of supplemental payments to retirees, but required that such payments “shall not be funded from
20 plan assets.”

21 **(a) Plaintiffs Cannot Prove That Section 1511-A Violates The**
22 **Pension Protection Act**

23 Plaintiffs claim that this section violates the Pension Protection Act, California
24 Constitution, article XVI, section 17, because it transfers funds out of a “trust.” But the SRBR
25 was not a separate “trust,” it was only a reserve, and the funds are still available for the benefit of
26 retirees. See *Claypool v. Wilson*, 4 Cal.App.4th 646, 674 (1992) (using former supplemental
27 COLA funds to reduce employer contributions to PERS did not violate Cal. Const., art. XVI, § 17,
28 where the funds “continue to be ‘held for the exclusive purposes of providing benefits to

1 participants in the pension or retirement system and their beneficiaries and defraying reasonable
2 expenses of administering the system”), quoting Cal. Const., art. XVI, § 17.

3 (b) **Plaintiffs Cannot Prove That Section 1511-A Violates Their**
4 **Vested Rights**

5 Plaintiffs cannot meet their burden of proving a vested or contractual right to SRBR.

6 First, the City Charter’s reservation of rights to “amend or otherwise change” its retirement
7 plans permits the City to eliminate the SRBR and provide instead that supplemental payments
8 shall not come from retirement plan assets.

9 Second, plaintiffs cannot meet their burden to show that the Municipal Code SRBR
10 provisions created vested rights to the SRBR.¹⁹

11 **Federated Plan.** For the Federated Plan, the Council discretion to authorize a distribution
12 “if any” indicates that the Council did not intend to “suspend legislative control” over the SRBR.
13 (former Municipal Code 3.28.340(E) [“The city council, after consideration of the
14 recommendation of the board, shall determine the distribution, if any, of the supplemental benefit
15 reserve to said persons”].) The Council confirmed its retention of legislative control by declining
16 to authorize any SRBR distributions from 1986 to 1999 and from 2010 to the present. (RJN,
17 Exhs. L (Resolution No. 75635), M (Resolution No. 76204).) *See Doyle v. City of Medford*, 606
18 F.3d 667, 675 (9th Cir. 2010); *Claypool*, 4 Cal. App. 4th at 669-670 (although declining to decide
19 the existence of vested rights in former supplemental COLA plan for current employees, opined
20 no vested rights violation where payment of supplemental COLAs depended expressly on the
21 availability of funds, given that the “implication of suspension of legislative control must be
22 ‘unmistakable’”).

23 In *Doyle*, despite a state mandate that a local entity provide retiree health care coverage,
24

25 ¹⁹ If any ordinance or other legislative enactment established vested contractual rights, those rights
26 would not extend to City retirees “who retired prior to the effective dates of the former programs
27 because they did not exchange their labors for the benefits created after retirement and for that
28 reason gained no vested rights to them.” *Claypool*, 4 Cal.App.4th at 660.

1 the Court found no vested right because the obligation included "discretion" not subject to
2 "particularized criteria" to refuse to provide the benefit. Similarly, here, the Municipal Code gives
3 the City Council complete discretion without imposing any particularized criteria. *See also*
4 *Ventura County Retired Employees' Ass'n v. County of Ventura*, 228 Cal.App.3d 1594, 1599
5 (1991) (no vested right where legislative body "may authorize payment of all, or such portion as it
6 may elect" of healthcare premiums for retired employees.")

7 The Court's order on summary adjudication noted that "the City's discretion with regard to
8 distributions is distinct from having discretion to abolish the SRBR altogether" (Order at 7:19-21),
9 But if any element of a benefit involves discretion, there is no vested right. *Doyle*, 606 F.3d at
10 675-676 ("Only if the governing statute compels a result upon compliance with certain criteria,
11 none of which involve[s] the exercise of discretion by the reviewing body, does it create a
12 constitutionally protected property interest") (citation omitted), emphasis in original. Here, the
13 grant of discretion not to distribute a 13th check would be meaningless if the City must continue to
14 fund the Federated SRBR. It would be absurd to have a fund set aside for SRBR distributions
15 that, if never made, would simply sit there and not be able to be used to offset unfunded liabilities
16 of the retirement plans. *Mason v. Retirement Bd.*, 111 Cal. App. 4th 1221, 1230 (2003) ("A
17 cardinal rule of construction is that statutes must be construed practically rather than technically,
18 and interpreted in a way that will lead to wise policy rather than mischief or absurdity. ...
19 'consideration should be given to the consequences that will flow from a particular
20 interpretation'" (citations omitted).

21 Moreover, Section 1511-A did not foreclose the possibility of supplemental payments to
22 retirees, but required only that such payments "shall not be funded from plan assets."

23 **Police and Fire Plan.** Under the SRBR, the City had complete discretion on the
24 methodology for making payments, and no retiree was guaranteed any particular amount, or any
25 payment at all. (Municipal Code 3.36.580(d)(5).) This Council discretion to establish payment
26 methodology indicates that the City did not intend to suspend legislative control over the SRBR
27 and prevents the creation of a vested property right. *Doyle*, 606 F.3d at 675-676 ("Thus, a statute
28 does not create a property right if it allows the decisionmaking body discretion to add an

1 additional criterion . . . , or to define its own criteria”); *Claypool*, 4 Cal. App. 4th at 670
2 (“implication of suspension of legislative control must be ‘unmistakable’” for a vested-right
3 finding).

4 Although this section contains the word “shall,” “[t]he word ‘shall,’ however, depending
5 on the context in which it is used, is not necessarily mandatory.” *Cal. Redevelopment Ass’n v.*
6 *Matosantos*, 53 Cal. 4th 231, 257 (2011); *Doyle*, 606 F.3d at 669-670, 673, 675-676 (even though
7 state statute and city resolution used the word “shall” in requiring payment of retiree health
8 benefits, the lack of standards connected to that requirement defeated vested property right).
9 Indeed, interpreting the word “shall” as creating a vested right in all instances would negate the
10 presumption against implying vested rights into statutory schemes, given that many statutes and
11 ordinances contain the word “shall.” *REAOC*, 52 Cal.4th at 1185-1186 (“to construe laws as
12 contracts when the obligation is not clearly and unequivocally expressed would be to limit
13 drastically the essential powers of a legislative body”).

14 Third, even if the Municipal Code did create vested rights in the SRBR, the City will show
15 at trial that Measure B remedies the “unintended consequences” of supplemental payments when
16 the plan is not fully funded. *Allen v. Bd. of Admin. of the Public Employees Ret. Sys.*, 34 Cal.3d
17 114, 119-124 (1983) (“Laws which restrict a party to those gains reasonably to be expected from
18 the contract are not subject to attack under the Contract Clause, notwithstanding that they
19 technically alter an obligation of a contract”); *Teachers’ Retirement Board v. Genest*, 154
20 Cal.App.4th 1012, 1034 (2007) (“without violating the contract clause, the state may pass laws
21 that restrict a party’s gains to those reasonably to be expected from the contract”). The original
22 purpose of the SRBR was for retirees to share in the fruits of a successful retirement fund, but it
23 now has the unintended effect of siphoning money away from the trust at a time when the plans
24 are grossly underfunded, thus increasing the City’s contribution rate, and requiring cuts in
25 employees and services.

26 In *Allen*, a 1947 law pegged legislators’ pension COLAs to the pay of current legislators; a
27 1966 law removed that link and instead imposed a COLA based on CPI. The Court held that the
28 1947 law had resulted in “unforeseen advantages” when the 1966 law greatly increased legislators

1 pay beyond all prior expectations. *Allen*, 34 Cal. 3d at 124-125. In the order on the City's motion
2 for summary adjudication, the Court distinguished *Allen* from this case based on *Allen's* reference
3 to "the constitutional revision of 1966 which expressly negated such expectations" of a vested
4 right. (Order at p. 6.) But in *Allen*, it was not the 1966 revision that created the vested right; it
5 was the earlier 1947 law which had given the legislators a pension pegged to the salaries of active
6 legislators. *Allen*, 34 Cal. 3d at 122, 124-126. In *Allen*, the 1966 revision eliminated pegging the
7 pension to actives' salaries. *Id.* Here, the comparable provision to the 1966 revision in *Allen* is
8 Measure B, which confines "retirement beneficiaries to those gains reasonably to be anticipated
9 from their employment contract." *Id.* at 125.

10 **(c) The Tort Claims Act Bars Any Request For Damages Based On**
11 **Suspension of SRBR**

12 No complaint claims that a plaintiff has filed a tort claim with the City in connection with
13 the suspension of SRBR in 2010, 2011 or 2012. Therefore, any claim for monetary relief is barred
14 in connection with the City's suspension of SRBR in those years. *Dalton v. East Bay Mun. Utility*
15 *Dist.*, 18 Cal. App. 4th 1566, 1568, 1574 (1993); *Sappington v. Orange Unified School Dist.*, 119
16 Cal. App. 4th 949, 955-956 (2004).

17 **(d) Public Policy Concerns Militate Against Any Requirement That**
18 **The SRBR Funds That the City Returned To The General**
19 **Retirement Funds Be Removed**

20 In early 2013, the City enacted ordinances that returned the SRBR funds to the general
21 retirement funds. *See Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1068, 1119
22 (2004) (because "a statute, once enacted, is presumed to be constitutional until it has been
23 judicially determined to be unconstitutional," a local executive official does not have "the
24 authority to disregard the terms of the statute in the absence of a judicial determination that it is
25 unconstitutional..."). As a result, the retirement funds' unfunded liabilities were greatly reduced
26 and the City was able to reduce its yearly contribution for employee pensions by approximately
27 \$17 million. The City has used those funds to restore City services and offer salary increases to its
28 employees.

Even if this Court finds that the SRBR program must continue, under public policy

1 principles, it must not order the return of the SRBR funds to the reserve. *See In re Retirement*
2 *Cases*, 110 Cal.App.4th 426, 444-445, 454-464 (2003) ("California courts 'have long recognized
3 the potential for allowing narrow exceptions to the general rule of retroactivity when
4 considerations of fairness and public policy are so compelling in a particular case that, on balance,
5 they outweigh the considerations that underlie the basic rule'"). Here, rolling back the transfer of
6 the SRBR balance to the retirement plan fund would result in (1) a sequestered fund that will be
7 used for no purpose at all if the City Council exercises its discretion not to distribute the monies in
8 the fund; and (2) reversal of the compensation increases of represented plaintiffs. Fairness to the
9 employees who negotiated for increased wages on reliance of implementation of this section, as
10 well as the public policy furthered by using funds to address the unfunded liabilities of the pension
11 funds instead of requiring them to remain idle support prospective application of any potential
12 equitable relief.

6. Plaintiffs Cannot Meet Their Burden To Prove The Illegality Of Section 1512-A, Which Continues Existing Provisions On Retiree Health Care

(a) **Section 1512-A(a) Simply Continues The Existing Municipal Code Requirement That Employees Pay Half Of Retiree Health Care Contributions**

17 Section 1512-A(a) provides all employees “must contribute at least half of the cost of
18 retiree healthcare, both normal cost and unfunded liabilities.” Plaintiffs claim that they have a
19 vested right to the City paying for all unfunded liabilities for retiree healthcare. But they cannot
20 meet their burden of showing “clear” and “unmistakable” evidence of any such promise by the
21 City. *REAOC*, 52 Cal. 4th at 1186.

22 First, even before the enactment of Measure B, in both retirement plans, the Municipal
23 Code required that employees make contributions in a one to one ratio and contained no
24 requirement that the City pay for unfunded liabilities. (Municipal Code 3.28.385(C), 3.36.575(D)
25 ["Contributions for other medical benefits shall be made by the City and members in the ratio of
26 one-to-one."])

27 Second, the City has never paid for all unfunded liabilities. At trial, the City will show that
28 historically, the City and unions have each paid half of the contribution rate set by the retirement

boards for retiree medical costs. Historically, this rate provided for partial prefunding but not full funding of the "ARC" – the yearly amount required to fully fund the benefit.

Third, at trial, the City will show that since 2009, after GASB required public employers to report all retiree healthcare unfunded liabilities, almost all City unions agreed to a "ramp up" in the contribution rates until the City and the employees each pay 50% of the full ARC. The unions and the City recently renewed these agreements.

This issue is governed by the decisions in *San Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal.App.4th at 1223-26, which held that unions could not bargain over an item then later claim that the item was vested, and *City of San Diego v. Haas*, 207 Cal.App.4th 472, 495 (2012), which held that "vested rights may not be implied ... where, as here, they are contrary to express terms of the parties' contract."

The POA does not contest Section 1512-A(a) on its face, but rather claims that it violates the POA's MOA with the City, which contains a 10% cap on retiree healthcare contributions. The POA cannot prove this claim because in a stipulation signed by all parties, and approved by the Court, the City agreed that agreements on retiree healthcare contributions would be honored. The Stipulation reads: "The effective date for implementation of Section 1512-A (a) (minimum contributions towards the cost of retiree healthcare) shall occur no sooner than January 1, 2014, except that contributions towards retiree healthcare shall be subject to any existing or future union agreements, or City resolutions, authorized prior to January 1, 2014, that specify employee contributions towards retiree healthcare."

(b) Section 1512-A(b) Does Not Change The Status Quo As To Vested Rights

There is no actual controversy as to Section 1512-A(b). It declares "no retiree healthcare plan or benefit shall grant any vested right, as the City retains its power to amend, change or terminate any plan provision." This section does not change the status quo, but rather (1) reflects whatever vested rights currently exist, since it does not purport to take them away, (2) and declares an intent not to create any new vested rights. This section must be presumed valid. *Tobe*, 9 Cal. 4th at 1102. Moreover, until the City applies this section in a manner that infringes on vested

1 rights, it is not ripe for adjudication. *Pacific Legal Foundation*, 33 Cal. 3d at 170, 173 (dispute
2 must be “concrete”).

3 **7. Section 1512-A(c) Simply Continues The Existing Municipal Code**
4 **Requirement That The City Subsidize Retiree Medical Premiums In**
5 **The Amount Of The Lowest Cost Plan Offered To Employees**

6 Under the Municipal Code, the City currently subsidizes retiree healthcare benefits in the
7 amount of the premium for the “lowest cost plan” offered to active City employees. The City will
8 show at trial that Measure B Section 1512-A(c) simply continues that practice, defining “low cost
9 plan” as “the medical plan which has the lowest monthly premium available to any active
10 employee in either the Police and Fire Department Retirement Plan or Federated City Employees’
11 Retirement System.”

12 The POA contends that this provision violates its vested rights because POA retirees are
13 entitled to the “lowest cost plan” provided to active police officers, not any city employees. But
14 the Municipal Code does not contain this distinction. Under Municipal Code section 3.36.1930D,
15 “‘lowest cost medical plan’ means that medical plan . . . [w]hich is an eligible medical plan as
16 defined in Section 3.36.1940” and [w]hich has the lowest monthly premium of all eligible medical
17 plans then in effect.” Under section 3.36.1940, an eligible medical plan is one “with which the
18 city has entered into a contract for the provision of hospital, medical, surgical and related benefits
19 as part of the city's benefits to city employees.” As admitted in prior briefing, the SJPOA *is*
20 *arguing for the resurrection of a Municipal Code provision eliminated in 1998.*

21 AFSCME apparently claims a right to bargain for its own definition of “low-cost plan.”
22 AFSCME cannot meet its burden on this claim because retirees do not have a right to bargain.
23 *Sacto. Cty. Attys Ass’n v. Cty. of Sacto.*, PERB Dec. No. 2043-M, page 9 of adopted proposed
24 decision, fn. 4 (2009) (“a public employer is not required to bargain over ...health insurance
25 benefits” of “retirees”); see also *Allied Chemical and Alkali Workers of America v. Pittsburgh*
26 *Plate Glass Co.*, 404 U.S. 157, 172, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971) (“pensioners are not
27 ‘employees’ within the meaning of the collective-bargaining obligations of the Act”).
28

1 **8. Plaintiffs Cannot Meet Their Burden To Prove The Illegality Of**
2 **Section 1513-A, Which Addresses Pension Plan Management, Because**
3 **The City Has Enacted Ordinances Requiring That This Section Be**
4 **Applied Consistently With The State Constitution**

5 Section 1513-A(c) requires that pension plans be actuarially sound, minimize risks to the
6 City and its residents, and be prudent and reasonable in light of economic climate, among other
7 things. Plaintiffs complain that this section violates the state Pension Protection Act because it
8 requires the retirement boards to consider the interest of “taxpayers with respect to the costs of the
9 plans” (Section 1513-A(c)(ii).) They contend that Pension Protection Act requires retirement
10 boards to keep paramount the interests of retirees and beneficiaries.

11 Plaintiffs cannot “demonstrate that the act’s provisions inevitably pose a present total and
12 fatal conflict with applicable constitutional prohibitions.” *Tobe v. City of Santa Ana*, 9 Cal.4th at
13 1084. At trial, the City will show that the City has adopted a ordinances that require the City’s
14 Municipal Code to be interpreted consistently with state law, which includes the Pension
15 Protection Act, and in the event of a conflict, the Pension Protection Act shall prevail.²⁰ Nor can
16 plaintiffs meet their burden to show that this claim is ripe for adjudication. *Pacific Legal*
17 *Foundation*, 33 Cal. 3d at 170, 173 (dispute must be “concrete”). Unless and until the City does
18 something to violate state law, there is no controversy, and these claims are not ripe

19 **9. Plaintiffs Cannot Meet Their Burden To Prove The Illegality Of**
20 **Section 1515-A, The Severability Clause, Because The Clause Does Not**
21 **Violate Separation of Powers And Their Claim Is Not Ripe**

22 Section 1515-A provides a general severability clause which provides that if “any
23 ordinance adopted” pursuant to Measure B is held “invalid, unconstitutional or otherwise
24 unenforceable by a final judgment, the matter shall be referred to the City Council for
25 determination as to whether to amend the ordinance consistent with the judgment, or whether to
26 determine the section severable and ineffective.”

27 ²⁰ San Jose City Ordinance Nos. 29174, 29198, City Trial Exhibits 5300, 5301
28

1 Plaintiffs contend that this section violates separation of powers because it is the role of the
2 courts, not the City Council, to determine whether “the section is severable and ineffective.” But
3 they cannot meet their burden given that Section 1515-A is consistent with the common practice
4 of letting government defendants exercise discretion in complying with judgments. *Common*
5 *Cause v. Board of Supervisors*, 49 Cal. 3d 432, 445-446 (1989) (“although a court may issue a
6 writ of mandate requiring legislative or executive action to conform to the law, it may not
7 substitute its discretion for that of legislative or executive bodies in matters committed to the
8 discretion of those branches”).

9 Moreover, plaintiffs cannot show that this claim is ripe. There is currently no “ordinance
10 adopted” pursuant to Measure B that is the subject of this litigation, or that has been held invalid,
11 unconstitutional, or unenforceable. As such, there is no concrete issue to be decided. *Pacific*
12 *Legal Foundation*, 33 Cal. 3d at 170, 173.

13 **D. AFSCME Cannot Prove That Measure B Constitutes A Bill Of Attainder**

14 AFSCME claims that Measure B is a bill of attainder because it singles out City employees
15 for punishment by requiring them to pay increased contribution rates. A “bill of attainder” is a
16 “legislative act[] ... that appl[ies] either to named individuals or to easily ascertainable members
17 of a group in such a way as to inflict punishment on them without a judicial trial.” *Legislature of*
18 *the State of California v. Eu*, 54 Cal. 3d 492, 525 (1991) (citations omitted). Courts look to three
19 tests to determine punishment: (1) an “historical test” to “determine whether the subject
20 legislation imposes a kind of punishment traditionally deemed prohibited by the federal
21 Constitution;” (2) a “functional test” of whether the law “reasonably can be said to further
22 nonpunitive legislative purposes;” and (3) a “motivational” test, “inquiring whether the legislative
23 record evinces a congressional intent to punish.” *Eu*, 54 Cal.3d at 526 (citations omitted).

24 In response to the City’s demurrer, the Court found only that AFSCME had stated
25 sufficient facts to proceed to trial on the “motivational” test. To satisfy the “motivational” test for
26 punishment, AFSCME must prove that the legislation or ballot arguments were intended to *punish*
27 those individuals for any particular past misconduct.” *Eu*, 54 Cal.3d at 527 (emphasis in original).

28

1 AFSCME cannot meet this burden. AFSCME will attempt to show that Measure B
2 imposes a "fine" on AFSCME members because they refused to voluntarily forgo pension
3 reductions, retaliates against that the union for filing unfair labor practice charges, and results from
4 hostility – claiming that a City department head authored e-mail criticizing the productivity of
5 City employees and stating the City was waging a "war" on AFSCME.

6 At trial the City will show that the motive of Measure B was not to punish but to help solve
7 the City's financial crisis *Eu*, 54 Cal.3d at 526-527 (looking to ballot measure or circumstances
8 accompanying passage to find no intent to punish). And requiring that employees to pay for
9 unfunded liabilities cannot be deemed "punishment" of AFSCME members or anyone else.
10 *Sagaser v. McCarthy*, 176 Cal.App.3d 288, 306 (1986) ("Forbidden legislative punishment is not
11 involved merely because the Act imposes burdensome consequences"). If the Court in *Eu* did not
12 find a bill of attainder based on the "express intent" to dislodge two long term incumbent
13 legislators (54 Cal.3d at 526-527), AFSCME cannot prove attainder here.

14 **E. AFSCME Cannot Prove Its Claim For Equitable Estoppel**

15 To prove equitable estoppel, AFSCME "must prove (1) a representation or concealment of
16 material facts (2) made with knowledge, actual or virtual, of the true facts (3) to a party ignorant,
17 actually and permissibly, of the truth (4) with the intention, actual or virtual, that the latter act
18 upon it and (5) that the party actually was induced to act upon it." *Walsh*, 4 Cal.App.4th at 709.
19 "[I]n order for reliance upon a representation to support an estoppel, the reliance must be justified,
20 that is, the party asserting the estoppel must show that he was actually and permissibly ignorant of
21 the true facts." *Id.* at 710.

22 AFSCME, will not be able to meet this burden. First, if AFSCME is relying on statements
23 made outside City ordinances, promissory estoppel will not lie, because in San Jose, the Charter
24 requires that retirement plans must be enacted by ordinance. City Charter Section 1500; *San*
25 *Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Emples. Ret. Sys.*, 206
26 Cal.App.4th 594, 610-11 (2012) ("When there has been no compliance with the relevant charter
27 provision, the city may not be liable in quasi-contract and will not be estopped to deny the validity
28 of the contract."); *Poway Royal Mobilehome Owners Assn v. City of Poway*, 149 Cal.App.4th

1 1460, 1476(2007)("Numerous cases hold that promissory estoppel may not be raised against a
2 public entity when it would defeat the public policy of requiring adherence to statutory procedures
3 for entering into contracts.")

4 Second, AFSMCE cannot prove that its members accepted employment and continued
5 working for the City based on any misrepresentation about benefits. See *Walsh*, 4 Cal.App.4th at
6 710 (dismissing claim that legislator "could be permissibly ignorant of the fundamental
7 constitutional provisions applicable to his office").

8 **F. AFSCME And SJPOA Cannot Prove Their Claim For Violation Of The Bane**
9 **Act**

10 AFSCME and the SJPOA's constitutional causes of action each include a violation of
11 California Civil Code section 52.1 ("Section 52.1" or "Bane Act"), purely as a vehicle to "seek
12 redress in the Superior Court for violation of constitutional rights." (SJPOA Complaint, ¶ 73, n. 3;
13 see AFSCME FAC, page 18, n. 3.) They cannot prove these claims.

14 First, AFSCME and SJPOA do not have standing. Section 52.1 "is limited to plaintiffs who
15 themselves have been the subject of violence or threats." *Bay Area Rapid Transit Dist. v. Superior*
16 *Court*, 38 Cal.App.4th 141, 142, 144 (1995). There is no statutory authority or precedent for
17 conferring associational standing for Section 52.1 claims.

18 Second, Section 52.1 is not a vehicle for redress of constitutional harms. The California
19 Supreme Court has clearly articulated the "framework for determining the existence of a damages
20 action to remedy an asserted constitutional violation," and it does *not* include Section 52.1.
21 *Katzberg v. Regents of University of California*, 29 Cal.4th 300, 307, 317 (2002). Moreover, a
22 constitutional violation on its own – without the requisite threat, intimidation, or coercion – does
23 not implicate Section 52.1. *Shoyoye v. County of Los Angeles*, 203 Cal.App.4th 947, 957, 959
24 (2012) ("in pursuing relief for those constitutional violations under section 52.1," plaintiffs must
25 allege the acts "were accompanied by the requisite threats, intimidation, or coercion").

26 Here, plaintiffs do not attempt to show threats or intimidation, rather they assert "coercion"
27 related to the choice between pension plans. Even if true, this would be economic coercion, which
28 is not the egregious "coercion" contemplated by Section 52.1. *Schulte v. City of Sacramento*

1 (Case No. NO. CIV. S-05-1812 FCD) 2006 U.S. Dist. LEXIS 4971, *15 n. 7 (February 9, 2006)
2 (declining to "broaden the scope" of Section 52.1 to include "economic coercion" claims); *City*
3 *and County of San Francisco v. Ballard*, 136 Cal.App.4th 381, 408 (2006) (where plaintiff alleged
4 City coerced him by threatening to impose \$15 million in penalties and "partial demolition" of his
5 building if he did not perform "unrequired construction," court found he had "not alleged and the
6 record does not establish any conduct that rises to the level of a threat of violence or coercion"
7 under Section 52.1).

8 **V. CONCLUSION**

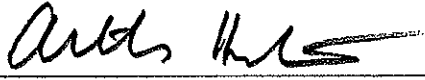
9 Upon a close and methodical examination of Measure B, the Court will conclude that the
10 Act is lawful, and that plaintiffs' claims are meritless. As the Act is fully severable, each section
11 must be considered.

12 The City looks forward to trial and expects to prevail.

13 DATED: July 8, 2013

Respectfully submitted,

14 MEYERS, NAVE, RIBACK, SILVER & WILSON

15
16 By: 
17 Arthur A. Hartinger
18 Attorneys for Defendant and Cross-Complainant
19 City of San Jose
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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of Alameda, State of California. My business address is 555 12th Street,
Suite 1500, Oakland, CA 94607.

5 On July 8, 2013, I served true copies of the following documents described as **TRIAL**
6 **BRIEF OF DEFENDANT/CROSS-PLAINTIFF CITY OF SAN JOSE AND DEFENDANT**
7 **DEBRA FIGONE, IN HER OFFICIAL CAPACITY** on the interested parties in this action as
follows:

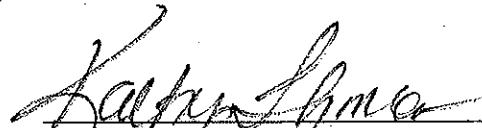
8 **SEE ATTACHED SERVICE LIST**

9 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the
10 persons at the addresses listed in the Service List and placed the envelope for collection and
11 mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave,
12 Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On
the same day that the correspondence is placed for collection and mailing, it is deposited in the
ordinary course of business with the United States Postal Service, in a sealed envelope with
postage fully prepaid.

13 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the
14 document(s) to be sent from e-mail address kthomas@meyersnave.com to the persons at the e-
15 mail addresses listed in the Service List. I did not receive, within a reasonable time after the
transmission, any electronic message or other indication that the transmission was unsuccessful.

16 I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

17 Executed on July 8, 2013, at Oakland, California.

18 
19 _____
20 Kathy Thomas/Julie Hokanson
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SERVICE LIST

<p>John McBride Christopher E. Platten Mark S. Renner WYLIE, MCBRIDE, PLATTEN & RENNER 2125 Canoas Garden Ave, Suite 120 San Jose, CA 95125 Telephone: 408-979-2920 Fax: 408-989-0932 E-Mail: jmcbride@wmprlaw.com cplatten@wmprlaw.com mrenner@wmprlaw.com</p>	<p>Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY MCCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA (Santa Clara Superior Court Case No. 112CV225928)</p> <p>AND</p> <p>Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON (Santa Clara Superior Court Case No. 112CV226574)</p> <p>AND</p> <p>Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO (Santa Clara Superior Court Case No. 112CV226570)</p>
<p>Gregg McLean Adam Jonathan Yank Gonzalo Martinez Jennifer Stoughton Amber L. West CARROLL, BURDICK & MCDONOUGH, LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104 Telephone: 415-989-5900 Fax: 415-989-0932 E-Mail: gadam@cbmlaw.com jyank@cbmlaw.com gmartinez@cbmlaw.com jstoughton@cbmlaw.com awest@cbmlaw.com</p>	<p>Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOC. (Santa Clara Superior Court Case No. 112CV225926)</p>
<p>Teague P. Paterson Vishtap M. Soroushian BEESON, TAYER & BODINE, APC Ross House, 2nd Floor 483 Ninth Street Oakland, CA 94607-4050 Telephone: 510-625-9700 Fax: 510-625-8275 E-Mail: tpaterson@beesontayer.com; vsoroushian@beesontayer.com;</p>	<p>Plaintiff, AFSCME LOCAL 101 (Santa Clara Superior Court Case No. 112CV227864)</p>

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	Harvey L. Leiderman Jeffrey R. Rieger REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 Telephone: 415-659-5914 Fax: 415-391-8269 E-Mail: hleiderman@reedsmith.com; jreiger@reedsmith.com	Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV226574) AND Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)
17 18 19 20 21 22	Stephen H. Silver, Esq. Richard A. Levine, Esq. Jacob A. Kalinski, Esq. Silver, Hadden, Silver, Wexler & Levine 1428 Second Street, Suite 200 P.O. Box 2161 Santa Monica, California 90401	Attorneys for Plaintiffs/Petitioners SAN JOSE RETIRED EMPLOYEES ASSOCIATION, HOWARD E. FLEMING, DONALD S. MACRAE, FRANCES J. OLSON, GARY J. RICHERT AND ROSALINDA NAVARRO (Santa Clara Superior Court Case No. 1-12-cv-233660)

2106344.1

FULL TEXT OF MEASURE B

**ARTICLE XV-A
RETIREMENT**

**PUBLIC EMPLOYEE PENSION PLAN AMENDMENTS - TO
ENSURE FAIR AND SUSTAINABLE RETIREMENT BENEFITS
WHILE PRESERVING ESSENTIAL CITY SERVICES**

The Citizens of the City of San Jose do hereby enact the following amendments to the City Charter which may be referred to as:
"The Sustainable Retirement Benefits and Compensation Act."

Section 1501-A: FINDINGS

The following services are essential to the health, safety, quality of life and well-being of San Jose residents: police protection; fire protection; street maintenance; libraries; and community centers (hereafter "Essential City Services").

The City's ability to provide its citizens with Essential City Services has been and continues to be threatened by budget cuts caused mainly by the climbing costs of employee benefit programs, and exacerbated by the economic crisis. The employer cost of the City's retirement plans is expected to continue to increase in the near future. In addition, the City's costs for other post employment benefits – primarily health benefits – are increasing. To adequately fund these costs, the City would be required to make additional cuts to Essential City Services.

By any measure, current and projected reductions in service levels are unacceptable, and will endanger the health, safety and well-being of the residents of San Jose.

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Without the reasonable cost containment provided in this Act, the economic viability of the City, and hence, the City's employment benefit programs, will be placed at an imminent risk.

The City and its residents always intended that post employment benefits be fair, reasonable and subject to the City's ability to pay without jeopardizing City services. At the same time, the City is and must remain committed to preserving the health, safety and well-being of its residents.

By this Act, the voters find and declare that post employment benefits must be adjusted in a manner that protects the City's viability and public safety, at the same time allowing for the continuation of fair post-employment benefits for its workers.

The Charter currently provides that the City retains the authority to amend or otherwise change any of its retirement plans, subject to other provisions of the Charter.

This Act is intended to strengthen the finances of the City to ensure the City's sustained ability to fund a reasonable level of benefits as contemplated at the time of the voters' initial adoption of the City's retirement programs. It is further designed to ensure that future retirement benefit increases be approved by the voters.

Section 1502-A: INTENT

This Act is intended to ensure the City can provide reasonable and sustainable post employment benefits while at the same time delivering Essential City Services to the residents of San Jose.

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The City reaffirms its plenary authority as a charter city to control and manage all compensation provided to its employees as a municipal affair under the California Constitution.

The City reaffirms its inherent right to act responsibly to preserve the health, welfare and well-being of its residents.

This Act is not intended to deprive any current or former employees of benefits earned and accrued for prior service as of the time of the Act's effective date; rather, the Act is intended to preserve earned benefits as of the effective date of the Act.

This Act is not intended to reduce the pension amounts received by any retiree or to take away any cost of living increases paid to retirees as of the effective date of the Act.

The City expressly retains its authority existing as of January 1, 2012, to amend, change or terminate any retirement or other post employment benefit program provided by the City pursuant to Charter Sections 1500 and 1503.

Section 1503-A. Act Supersedes All Conflicting Provisions

The provisions of this Act shall prevail over all other conflicting or inconsistent wage, pension or post employment benefit provisions in the Charter, ordinances, resolutions or other enactments.

The City Council shall adopt ordinances as appropriate to implement and effectuate the provisions of this Act. The goal is that such ordinances shall become effective no later than September 30, 2012.

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Section 1504-A. Reservation of Voter Authority

The voters expressly reserve the right to consider any change in matters related to pension and other post employment benefits. Neither the City Council, nor any arbitrator appointed pursuant to Charter Section 1111, shall have authority to agree to or provide any increase in pension and/or retiree healthcare benefits without voter approval, except that the Council shall have the authority to adopt Tier 2 pension benefit plans within the limits set forth herein.

Section 1505-A. Reservation of Rights to City Council

Subject to the limitations set forth in this Act, the City Council retains its authority to take all actions necessary to effectuate the terms of this Act, to make any and all changes to retirement plans necessary to ensure the preservation of the tax status of the plans, and at any time, or from time to time, to amend or otherwise change any retirement plan or plans or establish new or different plan or plans for all or any officers or employees subject to the terms of this Act.

Section 1506-A. Current Employees

(a) "Current Employees" means employees of the City of San Jose as of the effective date of this Act and who are not covered under the Tier 2 Plan (Section 8).

(b) Unless they voluntarily opt in to the Voluntary Election Program ("VEP," described herein), Current Employees shall have their compensation adjusted through additional retirement contributions in increments of 4% of pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs to

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amortize any pension unfunded liabilities, except for any pension unfunded liabilities that may exist due to Tier 2 benefits in the future. These contributions shall be in addition to employees' normal pension contributions and contributions towards retiree healthcare benefits.

(c) The starting date for an employee's compensation adjustment under this Section shall be June 23, 2013, regardless of whether the VEP has been implemented. If the VEP has not been implemented for any reason, the compensation adjustments shall apply to all Current Employees.

(d) The compensation adjustment through additional employee contributions for Current Employees shall be calculated separately for employees in the Police and Fire Department Retirement Plan and employees in the Federated City Employees' Retirement System.

(e) The compensation adjustment shall be treated in the same manner as any other employee contributions. Accordingly, the voters intend these additional payments to be made on a pre-tax basis through payroll deductions pursuant to applicable Internal Revenue Code Sections. The additional contributions shall be subject to withdrawal, return and redeposit in the same manner as any other employee contributions.

Section 1507-A: One Time Voluntary Election Program ("VEP")

The City Council shall adopt a Voluntary Election Program ("VEP") for all Current Employees who are members of the existing retirement plans of the City as of the effective date of this Act. The implementation of the VEP is contingent upon receipt of

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IRS approval. The VEP shall permit Current Employees a one time limited period to enroll in an alternative retirement program which, as described herein, shall preserve an employee's earned benefit accrual; the change in benefit accrual will apply only to the employee's future City service. Employees who opt into the VEP will be required to sign an irrevocable election waiver (as well as their spouse or domestic partner, former spouse or former domestic partner, if legally required) acknowledging that the employee irrevocably relinquishes his or her existing level of retirement benefits and has voluntarily chosen reduced benefits, as specified below.

The VEP shall have the following features and limitations:

(a) The plan shall not deprive any Current Employee who chooses to enroll in the VEP of the accrual rate (e.g. 2.5%) earned and accrued for service prior to the VEP's effective date; thus, the benefit accrual rate earned and accrued by individual employees for that prior service shall be preserved for payment at the time of retirement.

(b) Pension benefits under the VEP shall be based on the following limitations:

- (i) The accrual rate shall be 2.0% of "final compensation", hereinafter defined, per year of service for future years of service only.
- (ii) The maximum benefit shall remain the same as the maximum benefit for Current Employees.
- (iii) The current age of eligibility for service retirement under the existing plan as approved by the City

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Council as of the effective date of the Act for all years of service shall increase by six months annually on July 1 of each year until the retirement age reaches the age of 57 for employees in the Police and Fire Department Retirement Plan and the age of 62 for employees in the Federated City Employees' Retirement System. Earlier retirement shall be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

- (iv) The eligibility to retire at thirty (30) years of service regardless of age shall increase by 6 months annually on July 1 of each year starting July 1, 2017.
- (v) Cost of living adjustments shall be limited to the increase in the consumer price index, (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment following the effective date of the Act will be prorated based on the number of remaining months in the year after retirement of the employee.
- (vi) “Final compensation” shall mean the average annual pensionable pay of the highest three consecutive years of service.
- (vii) An employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time

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worked (including paid leave, but not including overtime).

(c) The cost sharing for the VEP for current service or current service benefits ("Normal Cost") shall not exceed the ratio of 3 for employees and 8 for the City, as presently set forth in the Charter. Employees who opt into the VEP will not be responsible for the payment of any pension unfunded liabilities of the system or plan.

(d) VEP Survivorship Benefits.

(i) Survivorship benefits for a death before retirement shall remain the same as the survivorship benefits for Current Employees in each plan.

(ii) Survivorship benefits for a spouse or domestic partner and/or child(ren) designated at the time of retirement for death after retirement shall be 50% of the pension benefit that the retiree was receiving. At the time of retirement, retirees can at their own cost elect additional survivorship benefits by taking an actuarially equivalent reduced benefit.

(e) VEP Disability Retirement Benefits.

(i) A service connected disability retirement benefit, as hereinafter defined, shall be as follows:

The employee or former employee shall receive an annual benefit based on 50% of the average annual pensionable pay of the highest three consecutive years of service.

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- (ii) A non-service connected disability retirement benefit shall be as follows:

The employee or former employee shall receive 2.0% times years of City Service (minimum 20% and maximum of 50%) based on the average annual pensionable pay of the highest three consecutive years of service. Employees shall not be eligible for a non-service connected disability retirement unless they have 5 years of service with the City.

- (iii) Cost of Living Adjustment ("COLA") provisions will be the same as for the service retirement benefit in the VEP.

Section 1508-A: Future Employees – Limitation on Retirement Benefits – Tier 2

To the extent not already enacted, the City shall adopt a retirement program for employees hired on or after the ordinance enacting Tier 2 is adopted. This retirement program – for new employees – shall be referred to as "Tier 2."

The Tier 2 program shall be limited as follows:

- (a) The program may be designed as a "hybrid plan" consisting of a combination of Social Security, a defined benefit plan and/or a defined contribution plan. If the City provides a defined benefit plan, the City's cost of such plan shall not exceed 50% of the total cost of the Tier 2 defined benefit plan (both normal cost and unfunded liabilities). The City may contribute to a defined contribution or other retirement plan only when and to the extent

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the total City contribution does not exceed 9%. If the City's share of a Tier 2 defined benefit plan is less than 9%, the City may, but shall not be required to, contribute the difference to a defined contribution plan.

(b) For any defined benefit plan, the age of eligibility for payment of accrued service retirement benefits shall be 65, except for sworn police officers and firefighters, whose service retirement age shall be 60. Earlier retirement may be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

(c) For any defined benefit plan, cost of living adjustments shall be limited to the increase in the consumer price index (San Jose - San Francisco - Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment will be prorated based on the number of months retired.

(d) For any defined benefit plan, "final compensation" shall mean the average annual earned pay of the highest three consecutive years of service. Final compensation shall be base pay only, excluding premium pays or other additional compensation.

(e) For any defined benefit plan, benefits shall accrue at a rate not to exceed 2% per year of service, not to exceed 65% of final compensation.

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(f) For any defined benefit plan, an employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time worked (including paid leave, but not including overtime).

(g) Employees who leave or have left City service and are subsequently rehired or reinstated shall be placed into the second tier of benefits (Tier 2). Employees who have at least five (5) years of service credit in the Federated City Employees' Retirement System or at least ten (10) years of service credit in the Police and Fire Department Retirement Plan on the date of separation and who have not obtained a return of contributions will have their benefit accrual rate preserved for the years of service prior to their leaving City service.

(h) Any plan adopted by the City Council is subject to termination or amendment in the Council's discretion. No plan subject to this section shall create a vested right to any benefit.

Section 1509-A: Disability Retirements

(a) To receive any disability retirement benefit under any pension plan, City employees must be incapable of engaging in any gainful employment for the City, but not yet eligible to retire (in terms of age and years of service). The determination of qualification for a disability retirement shall be made regardless of whether there are other positions available at the time a determination is made.

(b) An employee is considered "disabled" for purposes of qualifying for a disability retirement, if all of the following is met:

(i) An employee cannot do work that they did before; and

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(ii) It is determined that

1) an employee in the Federated City Employees' Retirement System cannot perform any other jobs described in the City's classification plan because of his or her medical condition(s); or

2) an employee in the Police and Fire Department Retirement Plan cannot perform any other jobs described in the City's classification plan in the employee's department because of his or her medical condition(s); and

(iii) The employee's disability has lasted or is expected to last for at least one year or to result in death.

(c) Determinations of disability shall be made by an independent panel of medical experts, appointed by the City Council. The independent panel shall serve to make disability determinations for both plans. Employees and the City shall have a right of appeal to an administrative law judge.

(d) The City may provide matching funds to obtain long term disability insurance for employees who do not qualify for a disability retirement but incur long term reductions in compensation as the result of work related injuries.

(e) The City shall not pay workers' compensation benefits for disability on top of disability retirement benefits without an offset to the service connected disability retirement allowance to eliminate duplication of benefits for the same cause of disability, consistent with the current provisions in the Federated City Employees' Retirement System.

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Section 1510-A: Emergency Measures to Contain Retiree Cost of Living Adjustments

If the City Council adopts a resolution declaring a fiscal and service level emergency, with a finding that it is necessary to suspend increases in cost of living payments to retirees the City may adopt the following emergency measures, applicable to retirees (current and future retirees employed as of the effective date of this Act):

(a) Cost of living adjustments ("COLAs") shall be temporarily suspended for all retirees in whole or in part for up to five years. The City Council shall restore COLAs prospectively (in whole or in part), if it determines that the fiscal emergency has eased sufficiently to permit the City to provide essential services protecting the health and well-being of City residents while paying the cost of such COLAs.

(b) In the event the City Council restores all or part of the COLA, it shall not exceed 3% for Current Retirees and Current Employees who did not opt into the VEP and 1.5% for Current Employees who opted into the VEP and 1.5% for employees in Tier 2.

Section 1511-A: Supplemental Payments to Retirees

The Supplemental Retiree Benefit Reserve ("SRBR") shall be discontinued, and the assets returned to the appropriate retirement trust fund. Any supplemental payments to retirees in addition to the benefits authorized herein shall not be funded from plan assets:

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Section 1512-A: Retiree Healthcare

(a) **Minimum Contributions.** Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.

(b) **Reservation of Rights.** No retiree healthcare plan or benefit shall grant any vested right, as the City retains its power to amend, change or terminate any plan provision.

(c) **Low Cost Plan.** For purposes of retiree healthcare benefits, "low cost plan" shall be defined as the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement System.

Section 1513-A: Actuarial Soundness (for both pension and retiree healthcare plans)

(a) All plans adopted pursuant to the Act shall be subject to an actuarial analysis publicly disclosed before adoption by the City Council, and pursuant to an independent valuation using standards set by the Government Accounting Standards Board and the Actuarial Standards Board, as may be amended from time to time. All plans adopted pursuant to the Act shall: (i) be actuarially sound; (ii) minimize any risk to the City and its residents; and (iii) be prudent and reasonable in light of the economic climate. The employees covered under the plans must share in the investment, mortality, and other risks and expenses of the plans.

(b) All of the City's pension and retiree healthcare plans must be actuarially sound, with unfunded liabilities determined annually

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through an independent audit using standards set by the Government Accounting Standards Board and the Actuarial Standards Board. No benefit or expense may be paid from the plans without being actuarially funded and explicitly recognized in determining the annual City and employee contributions into the plans.

(c) In setting the actuarial assumptions for the plans, valuing the liabilities of the plans, and determining the contributions required to fund the plans, the objectives of the City's retirement boards shall be to:

- (i) achieve and maintain full funding of the plans using at least a median economic planning scenario. The likelihood of favorable plan experience should be greater than the likelihood of unfavorable plan experience; and
- (ii) ensure fair and equitable treatment for current and future plan members and taxpayers with respect to the costs of the plans, and minimize any intergenerational transfer of costs.

(d) When investing the assets of the plans, the objective of the City's retirement boards shall be to maximize the rate of return without undue risk of loss while having proper regard to:

- (i) the funding objectives and actuarial assumptions of the plans; and
- (ii) the need to minimize the volatility of the plans' surplus or deficit and, by extension, the impact on the volatility of contributions required to be made by the City or employees.

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Section 1514-A: Savings

In the event Section 6 (b) is determined to be illegal, invalid or unenforceable as to Current Employees (using the definition in Section 6(a)), then, to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions. Any pay reductions implemented pursuant to this section shall not exceed 4% of compensation each year, capped at a maximum of 16% of pay.

Section 1515-A: Severability

(a) This Act shall be interpreted so as to be consistent with all federal and state laws, rules and regulations. The provisions of this Act are severable. If any section, sub-section, sentence or clause ("portion") of this Act is held to be invalid or unconstitutional by a final judgment of a court, such decision shall not affect the validity of the remaining portions of this amendment. The voters hereby declare that this Act, and each portion, would have been adopted irrespective of whether any one or more portions of the Act are found invalid. If any portion of this Act is held invalid as applied to any person or circumstance, such invalidity shall not affect any application of this Act which can be given effect. In particular, if any portion of this Act is held invalid as to Current Retirees, this shall not affect the application to Current Employees. If any portion of this Act is held invalid as to Current Employees, this shall not affect the application to New Employees. This Act shall be broadly construed to achieve its stated purposes. It is the intent of the voters that the provisions of this Act be interpreted or implemented by the City, courts and others in a manner that facilitates the purposes set forth herein.

February 8, 2012

(b) If any ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise unenforceable by a final judgment, the matter shall be referred to the City Council for determination as to whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective.

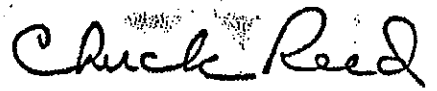
ADOPTED this 6th day of March, 2012, by the following vote:

AYES: CONSTANT, HERRERA, LICCARDO, NGUYEN,
 OLIVERIO, PYLE, ROCHA; REED.

NOES: CAMPOS, CHU, KALRA.

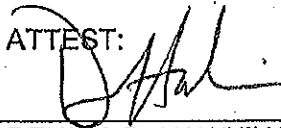
ABSENT: NONE.

DISQUALIFIED: NONE.



CHUCK REED
Mayor

ATTEST:



DENNIS D. HAWKINS, CMC
City Clerk